MOTION FILED
JAN 2 6 2004

(2)

No. 03-762

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

SANTEE SIOUX TRIBE OF NEBRASKA, A FEDERALLY RECOGNIZED INDIAN TRIBE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; BRIEF OF *AMICUS CURIAE* CHOCTAW NATION OF OKLAHOMA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Motion For Leave To File An *Amicus Curiae* Brief In Opposition to the Petition for a Writ of Certiorari

The Choctaw Nation of Oklahoma ("Tribe") hereby moves this Court for leave to file an *amicus curiae* brief opposing the petition for certiorari. *See* S. Ct. R. 37(2)(b). Counsel for respondent has not consented to the filing of the proposed *amicus* brief.

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INTEREST OF *AMICUS CURIAE*[1]

The Choctaw Nation of Oklahoma ("Tribe") believes the Eighth Circuit correctly held that the Lucky Tab II device is a Class II "technologic aid" under section 2703(7)(A)(i) of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21, and is not an unlawful gambling device under the Johnson Act, 15 U.S.C. §§ 1171-1175. The Tribe has an interest in this case because revenues derived from operating Class II games are essential to the Tribe's ability to maintain its economic self-sufficiency and political self-determination.

The Tribe is a federally-recognized Indian Tribe located within the State of Oklahoma, with approximately 160,000 enrolled members. It operates Class II gaming to support essential tribal governmental services. The Tribe relies almost entirely upon revenues from Class II gaming to fund its education, health care, housing, real estate, financial, communications, community services, social services, and other essential governmental programs. Class II gaming revenues are used for tribal day-care and senior citizen programs, health care clinics, and a forty-bed hospital, the construction of which was funded entirely by Class II gaming revenues. In addition, Class II gaming revenues fund tribal educational programs and college scholarships for over 1,000 Choctaw youths. Those same revenues support the building and maintenance of

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than the Tribe, its members or its counsel, made any monetary contribution to the preparation or submission of the brief. *See* S. Ct. R. 37(6).

tribal roads, law enforcement, water and waste-water systems, housing, and other governmental infrastructure systems and facilities. Finally, Class II gaming creates hundreds of jobs for local Indians and non-Indians.

The Choctaw Nation's government and economy rest on the revenue collected from its Class II gaming activities. Thus the Tribe has a sufficient interest here to warrant the Court's leave to file the following proposed *amicus* brief.

ARGUMENT

I. There is no conflict among the circuits regarding the interplay of IGRA and the Johnson Act, and this case does not raise that issue

The petition for certiorari in *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3373 (Nov. 21, 2003) (No. 03-740), asks whether IGRA creates an implied exemption from the Johnson Act as to Class II gaming devices. The Department of Justice ("DOJ") – quite properly – did not ask the Court to resolve that issue in this case. First, the Eighth Circuit resolved this issue in the DOJ's favor, and thus the DOJ cannot seek review. Second, and most critically, any resolution of this question would not affect the outcome in this case. Even if the Court were to reverse the Tenth Circuit's holding in *Seneca-Cayuga Tribe* and hold that the Johnson Act analysis should have been more fully exercised there, the Eighth Circuit's outcome in this case would not change.

Even though the DOJ cannot and does not ask the Court to use this case as a vehicle to decide the IGRA/Johnson Act issue, the petition nonetheless asserts that the Eighth Circuit's holding on this point is in conflict with the Tenth Circuit's holding in *Seneca-Cayuga Tribe*. *See* Petition at 2. That assertion is incorrect; there is no such split. All of the circuit courts of appeals decisions reviewing the current generation of electromechanical pull-tab dispensers, such as the machine at issue here, have unanimously upheld their legality. In each case, the result has turned on specific factual findings regarding the nature of the game at issue.

Moreover, contrary to the government's claimed conflict among the circuits, the Eighth Circuit here and the Tenth Circuit in *Seneca-Cayuga* embraced the same analytical approach. Both courts harmonized the two relevant statutory schemes, IGRA and the Johnson Act, just as this Court has instructed the lower federal courts to do. "'When there are two acts on the same subject the rule is to give effect to both if possible.'" *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 432 n. 43, 92 S.Ct. 2247, 2273, n. 43 (1972) (*quoting United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92, 20 L.Ed. 153 (1870)).

The practical, real-world result in all cases has been that electromechanical pull-tab dispensers are lawful aids to Class II games that may be used by tribal government gaming enterprises, assuming all of the other requirements of IGRA are met. A review of the cases reveals that the legal analysis leading to this result has, in each case, involved a sensible and successful effort to harmonize applicable provisions of IGRA and of the Johnson Act.

In this case, the Eighth Circuit affirmed the district court's finding (and the National Indian Gaming Commission's ("NIGC") conclusion) that the Lucky Tab II electromechanical pull-tab dispenser is a permissible Class II aid and not an unlawful "gambling device" under the Johnson Act. Consistent with the Tenth Circuit's analytical approach in *Seneca-Cayuga*, discussed below, the Eighth Circuit found "that the IGRA and the Johnson Act can be read together," *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607, 612 (8th Cir. 2003), and that "[t]he two statutes here are not irreconcilable." *Id.* at 611. The opinion does not rely on a "repeal by implication" analysis.

In *Seneca-Cayuga Tribe*, the Tenth Circuit reached the same conclusion using the same approach. The court there held that the electronic pull-tab dispenser at issue, the Magical Irish Instant Bingo Dispenser System, is a permissible Class II aid. *See id.* at 1044. The Tenth Circuit harmonized IGRA with the Johnson Act, adopting a construction that "gives meaning to both statutes." *Id.* at 1032. The court properly declined to "ascribe to Congress the intent both to carefully craft through IGRA this protection offered to users of Class II technologic aids and to simultaneously eviscerate those protections by exposing users of Class II technologic aids to Johnson Act liability for the very conduct authorized by IGRA." *Id.* The court concluded that "Congress specifically and affirmatively authorized the use of Class II technologic aids, subject to compliance with the other IGRA provisions that govern Class II gaming." *Id.*

The government argued in *Seneca-Cayuga* that, to adopt the tribes' construction of the two statutes, the court "must first find an implied partial repeal of the Johnson

Act by IGRA, a construction of statutes disfavored unless there is some affirmative showing of [congressional] intention to repeal." *Id.* at 1035 (internal quotations omitted). But the court disagreed: "our task, as we have explained, is to read the Johnson Act and IGRA together giving each Congress's enacted text the greatest continuing effect." *Id.* Indeed, the court expressly found that its harmonizing "construction gives meaning to both statutes. . . . " *Id.* at 1032. Simply put, the court did not use the "repeal by implication" analysis in adjudicating the case. Its analytical approach was entirely consistent with that of the Eighth Circuit in the instant case.

Moreover, the same analysis, harmonizing the two statutory schemes, has led to the same results in the three other recent Class II cases. First, in *U.S. v. 162 MegaMania Gambling Devices*, 231 F. 3d 713 (10th Cir. 2000), just as in *Seneca-Cayuga* and *Santee Sioux*, the court found that the Johnson Act and IGRA "are not inconsistent" and may be construed together. *Id.* at 725. The opinion does not rely on a "repeal by implication" analysis. The court held that MegaMania, an electronic bingo aid, "is not a gambling device as contemplated by either Act, but rather an electronic aid to bingo or a game similar to bingo," *id.* at 725 (internal quotations omitted), in part because "winners must defeat other players, not a machine." *Id.* at 721. The court concluded that MegaMania "is a Class II game under the Indian Gaming Regulatory Act, and its machines are not illegal gambling devices operated in violation of the Johnson Act." *Id.* at 726.

Similarly, in *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d 365 (D.C. Cir. 2000), the court held that the same Lucky Tab II eletromechanical paper pull-tab dispenser at issue here is a permissible Class II aid. *See id.* at 366. The

opinion does not rely on a "repeal by implication" analysis, nor does it even reveal that the government raised the Johnson Act question on appeal. The opinion cites with approval *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633, 635 n. 3 (D.C. Cir. 1994), "noting that IGRA repealed the Johnson Act with regard to Class III devices subject to a tribal-state compact but that there is no other repeal of the Johnson Act in IGRA, implying that Class II aids, permitted under IGRA, do not run afoul of the Johnson Act." *Diamond Game Enterprises*, 230 F.3d at 367.

Finally, in *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000), the government brought an *in rem* civil forfeiture action against MegaMania devices. As with the cases discussed above, the court harmonized IGRA and the Johnson Act and did not apply a "repeal by implication" analysis. *See id.* at 1102. The court noted that "while [absent a tribal-state compact or secretarial procedures] complete, self-contained electronic or mechanical facsimiles of a game of chance, including bingo, may indeed be forbidden by the Johnson Act after the enactment of IGRA . . . we hold that mere technologic aids to bingo, such as the MegaMania terminal, are not." *Id.* at 1102. In so holding, the court "maintain[ed] fidelity to two entrenched canons of statutory construction: (i) courts should give effect to both of two statutes covering related or overlapping subjects, and (ii) a specific statute governs a general one." *Id.* (citations and parentheticals omitted). The court's conclusion gave effect to "Congress's most recent relevant word on gaming . . . that aids to bingo are legal in Indian country." *Id.* Interestingly, "[t]he Government conceded . . . at oral argument . . . that the court *should 'read the two acts harmoniously; if it's a bingo*

aid, it's not a Johnson Act gambling device.'" Id. at 1102 n. 13 (emphasis added).

These cases embody the circuits' successful efforts to harmonize IGRA and the Johnson Act. The courts have done so in a way that has led to consistent, predictable results.[2] Thus while the DOJ labors to find a conflict between the circuits, this case does not "involve principles the settlement of which is of importance to the public as distinguished from that of the parties," for here there is no "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." *Layne & Bowler Corp. V. Western Well Works*, 261 U.S. 387, 393 (1923).

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[2] The other side of the Class II/Class III line has been demarcated with equal clarity. Just as the cases discussed above have consistently held that electromechanical pull-tab dispensers and electronic bingo aids are Class II, so too have the courts consistently held that electronic games where players play directly against the machine, and where the machine itself generates and applies the outcome – determinative element of chance, to be Class III. *See, e.g., Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1093 (9th Cir. 1992) (because the Pick 6 game at issue in the case involved only "a single participant play[ing] against the machine," it was an electronic facsimile rather than an aid, was thus Class III and required a compact); *Sycuan Band v. Roache*, 54 F.3d 535, 542-43 (9th Cir. 1995) (concluding electronic pull-tab game in which one played against machine was exact, self-contained, copy of paper version of game and was thus a Class III electronic facsimile); *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633, 636 (D.C. Cir. 1994) ("the Act's exclusion of electronic facsimiles removes games from the Class II category when those games are wholly incorporated into an electronic or electromechanical version."). *Compare* 25 C.F.R. § 542.8 (h) (NIGC's Minimum Internal Control Standards regarding electronic equipment used in pull-tabs) with 25 C.F.R. § 542.13 (NIGC's control standards for gaming machines).

Given the lack of any split among the circuits, either in outcome or in analytical approach, the Court should deny the instant petition.[3]

II. *United States v. Wilson* is Distinguishable on its Facts and Carries No Persuasive Weight

The DOJ's claimed conflict with *United States v. Wilson*, 475 F.2d 108 (9th Cir. 1973), does not withstand scrutiny. The machine at issue in *Wilson* functioned in a fundamentally different way than the Lucky Tab II game at issue here. The Ninth Circuit's Johnson Act analysis in that case is fact-bound and does not conflict with the Eight Circuit's holding with respect to Lucky Tab II.

The question in *Wilson* was whether any element of chance existed in a so-called "Bonanza" machine. According to the Ninth Circuit's opinion, the Bonanza machine accepted a customer's quarter in exchange for a coupon which was visible through a window in the machine. After purchasing the visible coupon, another coupon would become visible. Precisely how the machine selected the next coupon to become visible – and to what extent such selection depended on the machine's application of an element of chance – is not entirely clear from the opinion.

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[3] This clarity in distinguishing Class II aids from Class III facsimiles established by the cases discussed above has been enhanced by the NIGC's recent publication of final rules refining the regulatory definitions of key terms "electronic, computer or other technologic aid," "electronic or electromechanical facsimile," and "game similar to bingo." 67 Fed. Reg. 41166 (June 17, 2002).

The court affirmed the district court's conclusion that "most players put their first 25 cents in the 'Bonanza' machine because of the 'element of chance' that the next coupon, thus exposed, would entitle them, for another 25 cents, to a guaranteed payment of 50 cents to $31.00." *Id.* at 109. Thus, the court simply found that the window feature provided "the application of an element of chance" in the device. 15 U.S.C. § 1171(a)(2). The opinion is silent as to any other potential element of chance that may have existed in the device.

Wilson is thus distinguishable on its facts, as the element of chance in the Lucky Tab II game here is not applied by the vending machine, but rather by the pre-printing of the pull-tabs. *See Santee Sioux Tribe*, 324 F.3d at 612. The same is true as to the pull-tab dispenser at issue in *Seneca-Cayuga Tribe*. *See* 327 F.3d at 1040. The Johnson Act applies differently to these different types of machines; there is no conflict.

Moreover, *Wilson* carries little or no persuasive weight. It is a *per curiam* opinion of only seven paragraphs, contains a sparse factual record and minimal analysis, did not involve Indian country, and predated IGRA by some 15 years. Thus is it not surprising that *Wilson* has not, to our knowledge, been relied on or cited by any published opinion in the more than thirty years since it was decided.

III. Gaming Classification Determinations Are Inherently Fact-Bound

Determining where a particular game or device falls within established gambling laws is an inherently fact-bound endeavor. Every aspect of the particular game or

device at issue must be examined in substantial detail. The precise sequence of each event can matter, as does the manner in which each element of the game is conducted. The courts in these cases consider such factors as: how and where the element of chance that decides winners and losers is determined and applied; whether an individual player plays directly against the machine, or whether the player plays against other players; whether or not the Tribe is a participant in the game; what components are included in the machine and the function of each; and the speed of play, among others.

As a result, the judicial opinions in this area inevitably include extensive, detailed factual descriptions of the games, methodology, and equipment at issue. *See, e.g., Seneca-Cayuga Tribe*, 327 F.3d at 1024-27; *Santee Sioux Tribe*, 324 F.3d at 610; *162 MegaMania Gambling Devices*, 231 F.3d at 716-17; *Diamond Game Enterprises, Inc.*, 230 F. 3d at 367-68; *103 Electronic Gambling Devices*, 223 F.3d at 1093-94 & nn. 1-3; *Cabazon Band of Mission Indians v. NIGC*, 14 F.3d 633, 635 (D.C. Cir. 1994). These particulars are invariably tightly woven into the courts' analysis and the resulting outcomes. *See, e.g., Seneca-Cayuga Tribe*, 327 F.3d at 1040-417; *Santee Sioux Tribe*, 324 F.3d at 610; *162 MegaMania Gambling Devices*, 231 F.3d at 724-25; *Diamond Game Enterprises, Inc.*, 230 F.3d at 369-70; *103 Electronic Gambling Devices*, 223 F.3d at 1093-94 & nn. 1-3.

For example, in this case the Eighth Circuit observed that the device at issue is "essentially a computer," *Santee Sioux Tribe*, 324 F.3d at 610, with "a manual feed for money, a roll of paper pull-tabs, a bar code reader to read the back of each pull-tab, a rubber roller to dispense the pull-tabs, a cutter which cuts the pull-tabs from the roll,

and a cash drawer." *Id.* The bar code reader reads the pull-tab as it passes through the machine to the player, and based on this reading, a video screen displays the results of the play. The machine also emits different sounds, depending on whether it has read a winning or losing ticket. *See id.*

Play begins with a player inserting money into the machine. The player presses a start button, which is followed approximately two-and-a-half seconds later by an animated display. The machine dispenses the paper pull-tab to the player. The player can pull back the paper tab to verify the results of the play. The machine does not pay prizes to winners, make change, or give credits for accumulated wins. The device instructs the player to go to the cashier and present the pull-tab to redeem winnings. *See id.*

The pull-tabs are small, preprinted, two-ply paper cards. The player peels off the top layer to reveal symbols and patterns that show the results of the play. The pull-tabs also indicate the number manufactured, game type, and include a unique sequence number. An encrypted bar code is printed on the back of the pull-tab. Play results are determined by scanning the bar code with a laser light, after which the manufacturer's proprietary software reads the encrypted data on the bar code. "[A]nti-tampering devices ensure that a pull-tab that has already been scanned will be rejected and that the tabs will be dispensed in the correct sequence." *Id.* The device cannot operate, neither accepting money nor displaying symbols, without a roll of paper pull-tabs in place. *See id.*

As this case illustrates, game and equipment classification determinations are inevitably factually driven. *See, e.g., 162 MegaMania Gambling Devices*, 231 F.3d at 716 ("At the heart of this dispute is the nature of the game"). Resolving this case as to this one machine will not provide the government or the tribes with substantially helpful guidance as to the next game or device to hit the market. That next case will turn largely on the particular facts related to that future game and the equipment designed for its play. Supreme Court review in this case is therefore unwarranted.

IV. The DOJ's Claimed Fears Regarding Gambling Regulation Outside of Indian Country Are Overblown

The DOJ's purported fears regarding the potential impact of the circuit court's decision outside of Indian country are overblown. Even if the Johnson Act's definition of a gambling device was perceived to be narrowed when harmonized with IGRA, as the DOJ fears, the underlying gaming activity outside of Indian Country would still need to be authorized by some statute analogous to IGRA. Moreover, the DOJ's petition ignores the extensive matrix of federal laws empowering it to control illegal gambling. *See, e.g.,* 18 U.S.C. §§ 371 (conspiracy to run gambling business), 981-82 (civil and criminal forfeiture statutes), 1166 (making state gambling laws applicable to Indian country under certain circumstances), 1301-04 (importing, transporting, mailing lottery tickets, broadcasting lottery information), 1952 (use of interstate mail to carry on an illegal gambling business), 1953 (prohibiting interstate transportation of wagering paraphernalia), 1955 (prohibiting illegal gambling business), 1956-57 (money laundering

and illegal transactions with criminally derived funds from illegal gambling business), 1961 (RICO); 26 U.S.C. § 4401 (federal taxes on those accepting both authorized and unlawful wagers). In short, the Eighth Circuit's decision below is irrelevant to the regulation of unlawful gambling outside of Indian country.

CONCLUSION

For these reasons the Tribe respectfully requests that the Court deny the petition.

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